



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Racine Harley-Davidson, Inc., Complainant

Case No.: TR-01-0054

v.

Harley-Davidson Motor Company, Respondent

FINAL RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On September 27, 2002, Harley-Davidson Motor Company (Harley-Davidson or the respondent) filed a Motion Seeking Summary Judgment dismissing the five claims contained in the Amended Complaint filed by Racine Harley-Davidson, Inc. (RHDI or the complainant). Also on September 27, 2002, the complainant filed a Motion Seeking a Voluntary Dismissal of three of its claims. An order granting the complainant's motion to voluntarily dismiss the three claims was issued on October 15, 2002.

On October 14, 2002, the complainant filed a brief in response to the respondent's motion for summary judgment on the remaining two claims. In its response brief, the complainant did not oppose summary judgment on its claim filed pursuant to Wis. Stat. § 218.0116(7). Accordingly, the respondent's motion is granted for this claim. On October 28, 2002, the respondent filed a reply brief in support of its motion for summary judgment on the one remaining claim.

In accordance with Wis. Stat. §§. 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Racine Harley-Davidson, Inc. (complainant), by

Attorney Paul R. Norman
Boardman Law Firm
P. O. Box 927
Madison, WI 53701-0927

Harley-Davidson Motor Company, Inc. (respondent), by

Attorney Peter J. Stone
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The Administrative Law Judge issued a proposed ruling granting the motion on November 15, 2002. The complainant filed objections to the Proposed Ruling on November 27, 2002. The respondent filed comments generally in support of the Proposed Ruling on December 3, 2002, and filed supplementary material on December 12, 2002. The objections filed by the complainant renews the argument it made in its brief opposing the motion. The complainant cites case law as support for its argument that the assignment of territory made by the respondent should be construed as a part of the agreement between the respondent and the complainant and that the modification of the assigned territory constitutes a modification of the agreement. This argument is not persuasive.

As discussed in the ruling, the assignment of territory by a manufacturer for a dealer is an important component of the relationship between a manufacturer and a dealer. Wis. Stat. § 218.0114(11) requires a manufacturer to assign an area of sales responsibility to each of its dealers. However, the precise description of the assigned territory is not essential to the relationship. As stated by John D. Crowell in his affidavit filed in support of respondent's motion, Harley-Davidson routinely modify dealers' assigned territory for various reasons, such as the creation of new dealerships, the relocation of existing dealerships, and changes of zip code boundaries by the post office (Crowell affidavit, paragraph 3). There is no indication that the legislature intended that each modification of a dealer's assigned territory is the potential subject of a complaint pursuant to Wis. Stat. § 218.0116(8). The complainant's argument is adequately addressed in the Proposed Ruling and for the reasons stated in the Proposed Ruling is adopted as the final ruling.

The comments filed by the respondent generally support the Proposed Ruling except that the respondent requests that comments in the Proposed Ruling to the effect that the complainant's allegations, if proven to be true, would constitute a breach of the provisions of the agreement, not a modification of the agreement. The comments on this subject in the "Discussion" portion of the Proposed Ruling illustrate the point that even if the complainant's allegations were assumed to be true they still would not constitute a basis for a complaint filed pursuant to Wis. Stat. § 218.0116(8). This is an appropriate analysis for a summary judgment motion and will not be deleted.¹ The repetition of this determination as part of Conclusion of Law number 3 and in the Order is unnecessary and has been deleted. Other than the modifications of Conclusion of Law number 3 and the Order, the Proposed Ruling is adopted as the Final Decision in this matter.

The procedure for summary judgment for civil actions in circuit court is governed by Wis. Stat. § 802.08. For purposes of this ruling the procedure applicable for civil actions will be followed. The purpose of summary judgment is to obviate the need for a trial where there is no genuine issue to any material fact. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 286 N.W.2d 831 (1980). Summary judgment is not available if any disputed facts exist or if reasonable inferences leading to conflicting results may be drawn on the basis of uncontested

¹ The respondent also objected to the use of the phrase "fair and equitable" in this section of the Proposed Ruling as the description of the standard for Harley-Davidson's decisions to modify a dealer's assigned territory. This reference has been replaced with the language from the Sales and Service Agreement, "good faith business judgment."

facts. *Tomlin v. State Farm Mut. Auto Liability Ins. Co.*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

The methodology for summary judgment is that the court first examines the pleadings to determine whether claims have been stated and a material fact issue is presented. If the complaint states a claim and the pleading show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party has made a *prima facie* case, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether genuine issues exist as to any material fact, or reasonable conflicting inferences may be drawn from undisputed facts, and therefore trial is necessary. *In re Cherokee Park Plat*, 113 Wis. 2d 112, 334 N.W.2d 580 (App. 1983).

The remaining claim is a claim pursuant to Wis. Stat. § 218.0116(8)(a). Wis. Stat. § 218.0116(8)(a) provides:

A manufacturer or distributor may not modify a motor vehicle dealer agreement during the term of the agreement or upon its renewal if the modification substantially and adversely affects the motor vehicle dealer's rights, obligations, investment or return on investment without giving 60 days written notice of the proposed modification to the motor vehicle dealer unless the modification is required by law, court order or the licensor. Within the 60-day notice period the motor vehicle dealer may file with the department of transportation and the division of hearings and appeals and serve upon the respondent a complaint for a determination of whether there is good cause for permitting the proposed modification. The division of hearings and appeals shall promptly schedule a hearing and decide the matter. Multiple complaints pertaining to the same proposed modification shall be consolidated for hearing. The proposed modification may not take effect pending the determination of the matter.

RHDI's claim alleges that Harley-Davidson's stated intention to transfer the Burlington zip code from the assigned territory of RHDI's to that of Uke's Harley-Davidson, Inc., (Uke's) after Uke's relocation to its new dealership facilities constitutes a modification of the motor vehicle dealer agreement between Harley-Davidson and RHDI.² The issue that needs to be decided in order to rule on the motion for summary judgment is whether the alteration of RHDI's assigned territory by Harley-Davidson is a modification of the motor vehicle dealer agreement.³ This is an issue that is appropriate for summary judgment.

² An argument could be made that this claim is premature since reassignment of the Burlington zip code has not yet occurred. Harley-Davidson did suggest this argument in opposing some of RHDI's discovery requests; however, it did not raise this argument as part of its motion for summary judgment. Since Harley-Davidson has unequivocally stated it will transfer the Burlington zip code to Uke's after Uke's relocation, and because the parties have expended considerable resources preparing to litigate this claim, it would be inappropriate to now determine the claim is not ripe. A ruling on the merits will be issued.

³ The term "Agreement" for purposes of Wis. Stat. §§ 218.0101 to 218.0163 is defined at Wis. Stat. § 218.0101(1). Wis. Stat. § 218.0101(1) provides that "'Agreement' means a contract that describes the franchise relationship between manufacturers, distributors, importers and dealers."

The relationship between Harley-Davidson and RHDI is currently governed by the “Harley-Davidson Motor Company Motorcycle Dealer Contract” (Ulinski dep. exh. 14, attached to the affidavit of Attorney Peter J. Stone) and the “Harley-Davidson Motor Company General Conditions of Sales and Service” (Ulinski dep. exh. 15, attached to the affidavit of Attorney Peter J. Stone). These two documents together comprise the motor vehicle dealer agreement and for purposes of this decision will be referred to as the “Dealer Agreement.” The parties do not dispute that RHDI’s assigned territory is not described in the Dealer Agreement. With respect to the assignment of territory to individual dealers, the “Harley-Davidson Motor Company General Conditions of Sales and Service” provides:

Seller [Harley-Davidson] will assign Dealer a geographic area from time to time as Dealer’s primary market area, in which Dealer is responsible for effectively selling at retail, servicing and otherwise representing Harley-Davidson Products. Except as otherwise provided in paragraph 6 of the Signature Document [Harley-Davidson Motor Company Motorcycle Dealer Contract] it is understood and agreed that (a) Seller may modify, alter or adjust Dealer’s primary market area at any time, based on Seller’s good faith business judgment; and (b) Dealer’s primary market area is non-exclusive.

Paragraph six of the Harley-Davidson Motor Company Motorcycle Dealer Contract is titled “Special Market Rights” and memorializes, among other things, Harley-Davidson’s agreement not to establish any additional Harley-Davidson dealers or allow the relocation of existing Harley-Davidson dealers within specified distances from RHDI’s facilities during a specified period of time. Paragraph six also provides:

Dealer’s special market rights only limit the location at which additional Harley-Davidson motorcycle dealership may be established and are not in any way related to, and have no impact upon, Dealer’s Territory, which remains non-exclusive and subject to change by Harley-Davidson from time-to-time.

RHDI’s assigned territory is described by a list of zip codes and is set forth in separate documents.⁴ The grounds for Harley-Davidson’s motion for summary judgment on this claim is simply that RHDI’s assigned territory is not contained within the four corners of the Dealer Agreement; therefore, a change in the composition of the assigned territory is not a modification of the Dealer Agreement. The respondent further argues that under the terms of the Dealer Agreement it has expressly reserved the right to alter RHDI’s assigned territory.

⁴ In his deposition Mark Ulinski, the owner of RHDI, admitted receiving a sheet of paper, separate from the Dealer agreement, with a list of zip codes that comprised RHDI’s assigned territory. The list was given to him by Harley-Davidson’s district manager in 1993 or 1994 (Ulinski Tr. P. 20, attached to affidavit of Atty. Peter Stone). This sheet of paper is not included in the record for the summary judgment motion; however, the complainant does not deny the existence of a written list of zip codes which comprise RHDI’s assigned territory and has also produced various other documents that also list the zip codes in RHDI’s assigned territory

The complainant, citing principles of contract law, argues that the assignment of a dealer's territory is an essential component of the agreement and should be deemed to be a part of the Dealer Agreement. A dealer's assigned territory affects such things as:

1. A dealer's market potential which, in turn, affects the allocation of product the dealer will receive and the evaluation of a dealer's sales performance;
2. The right to send direct mail advertising to Harley-Davidson motorcycle owners residing in the assigned territory; and
3. Potential sites at which the dealer may apply to establish a secondary retail location or areas in which the dealer can protest the relocation or establishment of a competing dealer.

Assignment of a territory to a motor vehicle dealer is an important component of the agreement between a manufacturer and a dealer. Wis. Stat. § 218.0114(11) requires manufacturers to designate in writing the area of sales responsibility for a dealer.⁵ However, neither Wis. Stat. § 218.0114(11) nor any other statute or administrative rule regulating the relationship between motor vehicle manufacturers and dealers requires that the designation of a dealer's area of sales responsibility be a part of the motor vehicle dealer agreement. Wis. Stat. § 218.0114(7) expressly provides that "A manufacturer, distributor or importer may not modify the area of sales responsibility to avoid the requirements of s. 218.0116 (7)." The prohibition against a manufacturer modifying a dealer's area of sales responsibility in this one instance implies that manufacturers may modify a dealer's area of sales responsibility in other instances.

Although the assignment of a territory to a motor vehicle dealer is an important component of the agreement between a manufacturer and a dealer, the description of the specific territory assigned is not a necessary component. Harley-Davidson has written policies governing the alteration of the assignment of territory to its dealers upon the establishment of a new dealer or the relocation of an existing dealer (Ulinski dep. exhs. 10 and 11, attached to affidavit of Attorney Peter J. Stone). Harley-Davidson also set up an arbitration procedure for dealers to dispute an alteration of their assigned territory where dealers can raise arguments such as those RHDI is raising in this matter.

The complainant also argues that the intent of the parties at the time the Dealer Agreement was executed was that the description of the assigned territory be part of the Dealer Agreement. In the previous Dealer Contract between RHDI and Harley-Davidson, RHDI's assigned territory was listed in the Dealer Contract (Ulinski dep. exh. 1, attached to affidavit of Attorney Paul R. Norman at tab "C"). RHDI's assigned territory was listed as Racine County. In the mid 1990s, Harley-Davidson switched from a system of using counties for assigning territory to dealers to using zip codes. Dealer contracts executed after this change no longer

⁵ Wis. Stat. § 218.0114(11) provides that "A manufacturer, distributor or importer shall designate in writing the area of sales responsibility assigned to a motor vehicle dealer. A manufacturer, distributor or importer may not modify the area of sales responsibility to avoid the requirements of s. 218.0116 (7)."

include the description of the assigned territory in the Dealer Contract. The first description of RHDI's assigned territory after the switch did not include the Burlington zip code. Harley-Davidson's failure to include the Burlington zip code on this list prompted RHDI to file a complaint against Harley-Davidson pursuant to Wis. Stat. § 218.01(3)(fm) (now renumbered as Wis. Stat. § 218.0116(8)).

This complaint was subsequently withdrawn after Harley-Davidson reassigned the Burlington zip code to RHDI. Although Harley-Davidson settled this claim by reassigning the Burlington zip code to RHDI, as opposed to seeking dismissal of the claim, this action can not be construed as an admission that Harley-Davidson agreed that the assignment of territory to RHDI was part of the Dealer Agreement. In correspondence confirming the reassignment of the Burlington zip code to RHDI, the attorney for Harley-Davidson expressly stated that "we disagree with [the attorney for RHDI's] suggestion that the proposed shifting of the Burlington zip code represented a change in the parties' agreement under Chapter 218, Wis. Stats. By simply agreeing to return this disputed zip code to [RHDI], Harley-Davidson does not make any admission that any violation of law was threatened or occurred." (Ulinski dep. Exh. 6, attached to affidavit of Attorney Paul R. Norman at tab "C")

Finally, there is no indication that Harley-Davidson removed the description of its dealers' assigned territory from its motor vehicle dealer agreements in order to avoid complaints under Wis. Stat. § 218.0116(8) every time it alters a dealer's assigned territory. Harley-Davidson did not remove the description of the its dealers' assigned territory until several years after the enactment of Wis. Stat. § 218.01(3)(fm).

As additional support for its assertion that the alteration of a dealer's assigned territory constitutes the modification of dealer agreement, the complainant cites a Louisiana Court of Appeals decision, *Nissan North America, Inc. v. Royal Nissan Inc.*, 794 So.2d 45 (La. Ct. App. 2001). The factual situation in *Nissan* is that Nissan North America (Nissan) removed a census tract from the assigned territory each of two existing Nissan dealers in Baton Rouge, Royal Nissan and All Star Nissan, and reassigned them to the territory of a new Nissan dealership, Le Blanc Nissan. The two existing dealers filed complaints with the Louisiana Motor Vehicle Commission pursuant to a Louisiana statute that provides that "[t]he party seeking to modify or replace [a dealer] agreement must demonstrate by a preponderance of the evidence that there is good cause for the modification or replacement" La. R.S. 32: 1254(S). Nissan argued that the alteration of the existing dealers' assigned territories was not a modification of the dealer agreement, but rather the exercise of a contractual right reserved in the agreements. The court in *Nissan* held in this case that Nissan's alteration of the existing dealers' assigned territory was a modification of their respective dealer agreements.

A fundamental distinction between the facts in *Nissan* and those in the instant matter are that the assigned territory for each of the Nissan dealers was specified in their respective dealer agreements. ("Each [Nissan] dealer agreement with the distributor outlines that dealer's area of sales responsibility, or [Primary Market Area]" *Nissan*, 794 So.2d 45, at 47, footnote 1.) There is no indication that the court would have reached the same result if the outline of the assigned territories had been in a separate document. It should also be noted, that although both existing Nissan dealers filed complaints under La. R.S. 32: 1254(S), the court found that this statute did

not apply to the alteration of Royal Nissan's assigned territory because the dealer agreement executed by Nissan and Royal Nissan predated the statute. Instead the court found that the alteration of Royal Nissan's territory by Nissan violated the standard in the dealer agreement.⁶ The Division of Hearings and appeals does not have authority to enforce provisions of motor vehicle dealer agreements.

In conclusion, the provisions of the Harley-Davidson Motor Company General Conditions of Sales and Service Dealer Agreement give Harley-Davidson the authority to modify a dealer's assigned territory. However, Harley-Davidson must do so "based on [its] good faith business judgment." The complainant is alleging that the respondent's intention to reassign the Burlington zip code from RHDI to Uke's is contrary to Harley-Davidson's past practices and policies. Even if this were proven to be true, it would not constitute a modification of the Dealer Agreement, but rather a breach of the Dealer Agreement. The Division of Hearings and Appeals does not have authority to hear and decide breach of contract matters between motor vehicle dealers and manufacturers. Accordingly, Harley-Davidson's motion for summary judgment seeking dismissal of RHDI's claim filed pursuant to Wis. Stat. § 218.0116(8) for lack of jurisdiction must be granted.

Conclusions of Law

The Administrator concludes:

1. The Division of Hearings and Appeals has authority to hear and decide complaints filed pursuant to Wis. Stat. § 218.0116(8), alleging that a manufacturer is modifying a motor vehicle dealer agreement and that the modification substantially and adversely affects the rights, obligations, investment or return on investment of a motor vehicle dealer.

2. A motor vehicle dealer agreement for purposes of Wis. Stat. § 218.0116(8) is defined at Wis. Stat. § 218.0101(1). In the instant case the "Harley-Davidson Motor Company Motorcycle Dealer Contract" and the "Harley-Davidson Motor Company General Conditions of Sales and Service" together comprise the "motor vehicle dealer agreement."

3. The assignment of a territory by Harley-Davidson for RHDI is not part of the motor vehicle dealer agreement between Harley-Davidson and RHDI. Therefore, the alteration of RHDI's assigned territory by Harley-Davidson does not constitute the modification of the motor vehicle dealer agreement.

4. Pursuant to Wis. Stat. §§ 218.0116(8) and 227.43(1)(bg), the DHA has the authority to issue the following Order.

⁶ The dealer agreement provided that "[Nissan] reserves the right, in its reasonable discretion to issue new superceding 'Notices of Primary Market Area' to Dealer from time to time." The court found that, in the case of Royal Nissan, Nissan failed "to prove that its discretion was reasonable" *Nissan*, 794 So.2d 45, at 52.

Order

The Administrator orders:

The Division of Hearings and Appeals does not have authority to grant the relief requested by RHDI in its claim filed pursuant to Wis. Stat. § 218.0116(8). Harley-Davidson's Motion Seeking Summary Judgment is granted and the Amended Complaint filed by RHDI is DISMISSED.

Dated at Madison, Wisconsin on January 14, 2003.

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By: _____
David H. Schwarz
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of secs. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.